CENTER FOR INTERNATIONAL RELATIONS

Does the European Union Need a Constitution?

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INTRODUCTION

In the wake of the Nice summit, the constitutional debate in the European Union has significantly intensified. The Charter of Fundamental Rights, in particular, provided a new basis for realising the idea of a European constitution. The Intergovernmental Conference in 2004 will specifically deal with the separation and distribution of competencies between the European Union and its member states, the role of national parliaments and the deficits pertaining to the democratic legitimacy of European institutions.

Given the events of 11 September 2001, the constitutional debate is most likely to evolve even more dynamically into a discussion on the political character of the European Union. Against the background of international developments and the approaching Eastward enlargement, the countries of the European Union find themselves under increasing pressure to determine their own political identity and to anchor this identity in a European constitution. The decisions of the Laeken European Council have facilitated this process by instituting a convention, which, similar to the formulation of the Charter of Fundamental Rights, will elaborate and propose a constitution for the European Union.

The governments of the member states decided in Nice to involve the candidate countries in the discussion on the future constitution of the European Union. This decision respected the desire expressed by the candidate countries to participate in the shaping of the future of the European Union already prior to their own accession. Consequently, the convention is open to the participation of ten candidate countries, although without veto powers. As a result, candidate countries are now faced with the responsibility to develop concrete positions and proposals as their contribution to the work of the convention.

The present project of the Centre for International Relations is devoted to the post-Nice process and emphasises issues of constitution-making and distribution of competencies over a political debate that focuses primarily

on power relationships between member states and the European Union. The foremost aim of the project is to trigger a public debate in Poland on constitutional questions – mainly through parliamentarians, government, political parties and non-governmental organisations – and to formulate Polish positions on the central issues of the Intergovernmental Conference in 2004. In order to achieve this objective, the CIR organised an international seminar in December 2001, the central theme of which was the problem of the future shape of the Union. The present publication provides an overview of the discussions that took place during that meeting.

Marek A. Cichocki

SOME CALL IT CONSTITUTION… THE NECESSITY OF A POLITICAL UNION FOR EUROPE[1]

Ulrike Guérot

The ratification of the Nice Treaty and the 'post-Nice process' have fostered the debate on a European constitution. In this context, some caution is in order concerning the term "constitution" which, in application to the European Union, is problematic in many respects. What is at the heart of the discussion is the need for a political system for the European Union, that is, the amendment of the existing economic and monetary union by a political one. The European Union needs a political system. Only within and through a political system will it be possible to regulate the Euro and its political implications.

This discussion is not new. The debate on a European constitution essentially continues the discussion about the political union that followed the ratification of the Maastricht Treaty. Maastricht introduced the economic and monetary union; a political union was not achieved. The decisions necessary in order to increase the efficiency of the political system of the European Union were postponed to the Intergovernmental Conference of 1996 and the Amsterdam Treaty resulting from it. However, fundamental improvements were not achieved through this treaty either. Finally, the so-called 'leftovers' of Amsterdam[2] were to be rectified through the Nice Treaty, yet its provisions turned out to be inconsequent and altogether unsatisfactory. As a result, a fundamental reform of the political system of the European Union, its system of governance, has been postponed to the Intergovernmental Conference upcoming in 2004. It is this discussion that is currently being conducted under the heading of a 'constitutional debate'.

[1] The presentation was given during a seminar at the Center for International Ralations in Warsaw on 8 December 2001, that is, before the Laeken summit of the European Union.

[2] These 'leftovers' include, in particular, a limited number of commissioners, an extension of majority decision-making and a re-distribution of votes in the Council.

In this sense, the assumption is incorrect that the constitutional debate evolves around the fundamental question as to what the member states of the European intend to do together in the future. Obviously, this is an important element. Nonetheless, what is necessary in the first place is a political consolidation, or preservation, of those aspects that already exist within the European Union. The common market and the Euro, in particular, need to be stabilised through a functioning, efficient and democratic political system. This only requires a fundamental institutional reform.

The democratic deficit of the European Union, sufficiently explored in the scholarly literature, has become a serious problem since the Maastricht Treaty of 1992, in particular through the introduction of the Euro. As important an element of European integration as the Euro, affecting the daily life of all citizens, could not be created behind closed doors and without the consent of the citizens any longer. The so-called 'permissive consensus' failed in 1992, as was indicated by the French and Danish referenda on the Maastricht Treaty. The so-called 'Jean Monnet method' of European integration had been exhausted, according to which an element of economic integration generates a further step of political integration. Ever since, political integration requires public consent.

The political 'spill-over effect' of the Euro must not be underestimated. Who combines currencies and administers them together cannot but collectively decide and regulate the principal questions of how and for what money is being spent. Already Joseph Schumpeter had observed that all politics, if it is to be spendings effective, is essentially monetary politics. In other words, the Euro requires macro-economic regulation on the European level, since it has implications for the budgetary, tax, fiscal and, consequently, also social policies of the member states. This does not inevitably imply blind harmonisation but, at least, a form of mainstreaming these policies of the kind initiated by the Lisbon process of economic co-ordination. Basically, macroeconomic regulation means that the relationship between the market and the state on the European level are to be brought into a new equilibrium, in a democratic, rather than technocratic, manner. This requires a 'politicisation' of the institutional structures of the European Union, since the discussion of these problems is to follow ideational, or party political lines, rather than national ones.

The constitutional debate has to take this into account. In addition, the (institutional-political) constitution of the European Union cannot be treated in separation from the financial constitution of the European Union. Besides an institutional reform, the European Union requires reforms of the community policies, that is, of agricultural and structural policies. After all, a clear distribution of competencies relates to power and money. In other words, it addresses the question who has got the competency, and consequently the money, for a particular sector or a region (the region, the nation, or the European Union). Thus, this problem also, and comparable to the Euro, evolves around the relationship between the market and the state, and around the question, with whom the competency lies for making final decisions. It is not for no reason that competition law is one of the core elements of the community structure that significantly fostered community regulation in the 1980s.

Ever since Karl Marx, the relationship between the market and the state has been at the core of statehood for the (new) nations of early modernity. It characterises the fundamental political and macro-economic structure of these states, through political majorities for or against particular views, be they market economic, liberal or socialist ones. The question of the relationship between the market and the state has therefore, and ever since, followed a classical 'left-right paradigm' within European party systems. What is more, it can even be considered to be their dominant principle, their primary cleavage. What follows from this is the above-mentioned necessity to politicise the institutional system of the European Union. This means democratisation through parliamentarisation. In the (European) parliament, it will soon be necessary to find political majorities for one or another orientation of European Union policies.

This requires an institutional reform introducing the future election of the president of the European Union's Commission by the European Parliament. This will induce citizens with the feeling that they share in the decisions about the political orientation of European Union policies, that they can agree with the policies of the Commission by re-electing it, or disagree by voting it out of office, that they can sanction by changing the majorities in the European Parliament. A 'left-wing' or 'right-wing', a 'liberal' or 'green' majority in the European Parliament would imply an according constella-

tion in the Commission and accordingly shape European Union policies. In a second step, the European parties and the electoral system of the European Parliament could and should be deliberated within an institutional reform. Central to such deliberations should be, in the long term, the creation of genuine trans-European parties and elections to the European Parliament, which are not based on national lists any longer. Constituencies could be established purely on the basis of population size and not along with national borders anymore. Majority decisions as a fundamental principle in the Council would be a further necessary step, also the extension of co-decision of the European Parliament to all areas, where the Council makes decisions by majority vote. Finally, an important element would have to be the abolition of the national principle in composing the Commission, that is, not all European Union member states would be automatically represented by a commissioner any longer. Instead, the Commission would be, similar to national governments, composed according to political as well as qualitative characteristics and according to the number of portfolios required. Furthermore, a clear separation would have to be drawn between legislative and executive functions of the Council. Where necessary, the Council should convene in public in order to enhance the transparency and, as a result, democratic character of the political system of the European Union. Simultaneously, the Commission should increasingly grow into the role of a future executive within the political system of the European Union. In such an institutional system, where the commission would need the confidence of and a majority in the European Parliament, it should be considered, whether or not the European Parliament should be given the right to votes of no-confidence vis-à-vis the Commission. Alternative solutions, such as the right of the European Council to dissolve the European Parliament, originate in a presidential, not however in the parliamentary, democratic tradition. Obviously, all these scenarios have to consider and maintain the specific, triangular balance of European Union institutions (Council, Commission and Parliament).

Only within such an institutional system, which could be labelled a 'functional federation', will it be possible to arrive at efficient, clear and thus democratic political decisions that are based on elected majorities. Whether or not the necessary institutional reform is coined 'constitution' or 'basic treaty' is a secondary issue.

What is important is that, on all levels of the institutional system – European Parliament and its mode of elections, Commission, distribution of votes in the Council and majority decisions, the principle of national representation is broken down, since political majorities and minorities do not follow national boundaries anymore. An example is the recent Irish referendum on the Treaty of Nice. Not 'the Irish' as such and in their majority rejected Nice but a minority of 15 percent of the voting population.

This goes to show that the decision on institutional reform, which will be elaborated by the European Convention and subject to the Intergovernmental Conference in 2004, should possibly be made in a way that renders such presumably 'national' blockades impossible. National referenda in individual member states involve precisely this risk of blockade. Therefore, it would be worth considering a European referendum – one citizen, one vote – where votes would not be counted 'nationally'. Since this possibility entails a number of problems and risks, a second option would be parliamentary decision, that is, a qualified majority in the European Parliament, eventually combined with a super-qualified majority in the European Council. As such constitution-making in the European Union represents a qualitative leap towards an 'entité politique', which must be based on voluntary participation, the possibility of an 'exit clause' appears to be the logical consequence (in particular, if a European-wide direct or indirect voting procedure on the 2004 results in a partial rejection along with national boundaries, that is, if the majority of the population of a given country or the majority of the MEP's of a given country vote against a European constitution).

Only the abolition of the national principle within the institutional structure of the European Union will render the political system of the Union efficient and acceptable to the population, in particular with a view at future rounds of enlargement. The hitherto existing institutional setting of the European Union essentially enforces national 'segregation'. An example is the possible accession of the successor states of former Yugoslavia. Each of them are better off acceding to the European Union as individual countries, or 'national entities', than as hypothetical parts of the former Yugoslav federation. Under the current regulations, an independent Kosovo could be represented directly on the European level, having seats in the European Parliament, one place in the Commission, and individual votes in the Council.

As part of the Yugoslav federation none of this would have been possible. This illustrates how, in the present system, small national entities are at a structural advantage over larger regional and federal units, such as the German Länder.

The discussion on clear separation or return of competencies within the broader constitutional debate reflects and responds to this representational distortion in the institutional system of the European Union. Precisely because, for instance, the German Länder are not directly represented on the level of the European Union and thus without direct influence, their consequent claim is the return of competencies from the European to the regional level. This distortion can only be overcome through breaking down national representation in the institutional and thus political system of the European Union.

Furthermore, the separation of competencies, primarily a question of possibilities for regional economic development and thus subsidies, must not impair the integrative effects of European competition law. After all, subsidies that may be useful and possible in one region are not, by necessity, equally useful and possible in another. Hence, either the regions accept the European regulations for competition and subsidies in order to maintain the common market, which necessitates unified rules. Or an ex ante and net transfer from more to less affluent regions and nations, respectively, would have to be undertaken. Even in this scenario, the capacity for leverage on part of the European Union would have to be retained, at least in form of general guidelines. Otherwise European infrastructural policies, to give but one example, and thus the realisation of comparable living standards (set out in art. 3a of the European Union Treaty) would be rendered impossible. By no means does this imply that the Commission of the European Union is to decide on each an every bridge to be built. It does, however, mean that the drafting of a constitution with clearly separated competencies is impossible without principal deliberations on the financial constitution of the European Union. As the financial constitution has a direct bearing on community policies, a discussion of possible reforms of these community policies also appears to be inevitable.

What can be the source for the integrative and federating thrust necessary for such fundamental institutional reforms of the European Union over the years to come?

Between 1945/1957 and 1989, the federating force of the European Union was, without doubt and in many respects, the Soviet Union. A less immanent, yet since 11 September 2001 increasingly obvious, federating factor is globalisation. Ranging from the maintenance of peace and security to a more proactive influence on global processes, globalisation represents a new motivation as well as new energy for the future European Union. Only in an integrated form and equipped with an efficient political system, the European Union and its member states will be able to assert their interests in the international environment of the 21st century. Given this dimension and historical perspective, it should be possible to arrive at an agreement on a European constitution, institutional reform and a remaking of community policies, which are in the common interest of Europe!

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Translated by Jörg Forbrig

DOES THE EUROPEAN UNION NEED A CONSTITUTION?

Leszek Jesień

The Present State of European Integration

1. Today, the EU numbers 15 member states of Western, Northern and Southern Europe. Today, the EU has, as it were, a hole in its middle, made up of the candidate states of Central and Eastern Europe. Europe needs a complementation: EU enlargement.

2. The institutions of a Europe 'downsized' in such a fashion were set up in the 1950s for the benefit of integration involving the six founding states. In due course, these institutions were reformed to the rhythm of the successive waves of enlargement. The consecutive reforms were the Treaty on the merger of executive bodies of 1967, the Single European Act of 1986, the Treaties of Maastricht (1991), Amsterdam (1997) and Nice (2000). The last 15 years have been the time of a specific EU institutional and enlargement 'revolution'. The 'revolution' will reach its apogee with the enlargement in 2004, and an attempt to determine Europe's final shape, also envisaged for 2004.

3. In the course of integration to date, the dominant role has been played all along by the member states. It is the member states that have decided all along about the successive fundamental steps in the integration process. This state of affairs is reflected today in the role played by the European Council, which determines the principal directions of EU action. It may be described as a specific 'dictatorship' of the member states in the EU institutional make-up.

4. Clearly, an essential role is also played by supranational institutions: the Commission frequently sets agendas for meetings and activities, and enjoys a monopoly for proposing legislation on a number of matters; the European Parliament has had its powers considerably broadened, and is getting to resemble an ordinary lower house more and more in its control capacity; the European Court of Justice performs the functions of a constitutional court, a state tribunal and a supreme administrative court.

5. The EU has no proper foreign policy or defence policy coupled with it. Neither the CFSP, nor the European Defence and Security Policy, even together with the planned rapid reaction force, makes it possible to pursue Europe's interest in its relations with the outside world. Perhaps there is no such thing as a single, coherently articulated Europe's interest; that is precisely why a centre should be created to define the interest of the European Union as a whole in international relations.

6. The EU's justice and home affairs (Third Pillar) are being gradually transferred to the Community sphere from the sphere of the member states' exclusive decision and 'light' coordination by conventions. This is true of the Schengen Agreement, which allows full freedom of movement of people across the Community, or even more broadly: within the EC and Scandinavia (including Norway and Iceland). This is also happening as a result of the events of 11 September in New York and Washington, which will result in the creation of a European arrest warrant. Competence over asylum policy, too, will be transferred gradually to the Community.

7. The present state of affairs is integration based on a strong foundation of an integrated economy. In this area, one may distinguish between the level of full integration and those policies which are at a transitional stage.

(a) There is full integration within the Single Market, to be complemented, as of 1 January 2002, by an additional powerful bond: a common currency, the Euro. A customs union, together with trade policy, which rests completely in the hands of the Community (excluding the services, however), provide the basis for a good operation of the Single Market. The Single Market is supported by the Common Agricultural Policy, which allows full freedom of movement of both industrial and agricultural products. An efficient operation of the four economic freedoms (movement of goods, services, capital and people) is possible thanks to the competition rules, supervised by the Community, being respected.

(b) Not all policies are fully integrated. Such is the case with the transport, energy and telecommunications policies. One may speak of 'transitional' policies here, as competence over them can be expected to be transferred completely to the Community in due course.

This is not likely to happen to all policies. Culture and education will remain in the hands of the member states, as there is no apparent need for any further uniformisation of these activities, except for supporting student exchange, scientific research and translation, etc., which is already being done.

The Objectives of European Integration in the Next Few Years

1. The first challenge facing the European Union in the immediate future (apart from the introduction of the euro) is efficient enlargement. It involves two problems, symmetrical for the uniting Europe:

(a) The present EU members should conduct the negotiations and bring in the new members in such a way as to avoid causing social frustration in the candidate states, which may result from disappointed hopes. It is not money that is the point. The essential point about good enlargement is whether the present EU will succeed in persuading public opinion in the present candidate states that the process is conducted according to clearly formulated criteria, with respect for the candidates' interests, and aims at a full equality of membership rights. It is true that public opinion in the present member states is not enthusiastic about EU enlargement. Nevertheless, no effort should be spared to ensure that enlargement takes place in an atmosphere of concern for mutual interests in the spirit of partnership, and of broad-based agreement, rather than an atmosphere of quarrels and mutual grievances.

(b) The future members, and present candidates, on the other hand, face the challenge of mentally adopting the *acquis*. This means they have to overcome the mental barrier in themselves, separating them from being EU members. The object is to assume full responsibility for the fate of integration, its success or failure. From poor relations over the border, they must turn into partners – even though not well-to-do, but partners nevertheless – in a joint project.

On the day of accession, the European law we are adjusting ourselves to today must become, mentally, OUR law. Community institutions, abstract today, must become our institutions that probably need improvement and reform, but that also need to be protected and defended. In the mentality of the Polish people, Brussels must become OUR city.

2. One can safely assume that in a few years' time the EU will consist of nearly 30 member states. The prospect of such a big number of member states upon EU enlargement results generally, and rightly, in attention and efforts being focused on improving the efficiency of Community institutions. This was the purpose the Treaties of Amsterdam and Nice served to achieve.

However, the central underlying problem of institutional efficiency is not so much the future number of EU member states as such, but the new dimension the European Union will assume upon the admission of new states. The EU will face the challenge of fulfilling the dream of its founding fathers, who saw the involvement of all states of the Old Continent in the European integration process. From this problem, there follow two principal challenges to the next Intergovernmental Conference. The first one is to define the scope of integration (what do we want to do together?). The other challenge is how to give legitimacy to these efforts.

These are not sequential problems, i.e. the point is not for the scope of integration to determine what kind of institutions we need, and for a legitimisation method to match them to be selected afterwards. Such an approach seems inadequate for addressing properly the historic challenges facing the Intergovernmental Conference 2004. What is needed is a SIMULTANEOUS determination of the scope of integration efforts and the way to give them legitimacy.

3. The first challenge: what do we want to do together?

(a) For EU interests to be pursued in international relations, the EU needs to have a coherent, uniform foreign policy and the instruments to implement it. Without a clear foreign policy underpinned by an armed wing there will be no uniform perception or understanding of the EU by its citizens. If my state ensures my defence – however illusory – against dangers, why should I identify with what Brussels has to say on the issue? Or, looking from another side: if NATO ensures my defence, why should I care about EU decisions on the matter?

The demand for a common foreign and defence policy has enormous consequences for the evolution of political life at the European level. It is worth stressing here that the European institutions will not become serious and powerful in the eyes of European citizens, unless foreign policy, along with its military dimension, is placed in the hands of those institutions.

(b) The recent advances in transferring competence over the Third Pillar (common policy on justice and home affairs) to the Community – visa and asylum policies, the European arrest warrant and a strengthening of the Europol – seem to leave relatively little room for further integration in this area.

(c) The economic area of integration will shortly gain the strongest new basis since the establishment of a customs union in 1968: a single, common currency, the euro. Its political impact is likely to reach far beyond pure economy. A strong bond for political integration will appear.

(d) Nevertheless, it seems necessary to complete integration in a few crucial areas of economic life. Telecommunications (including a common numbering system), energy policy, transport policy and taxation are areas where one ought to look for reasons for joint, resolute action. For example, why not impose a European tax, as suggested by Romano Prodi?

Clearly, the attitudes of the political elites towards those areas of the economy derive from ideological views. These areas need, therefore, to be integrated, while allowing, at the same time, these markets to become the object of a political game between parties at the European level. In other words, if we establish fully functioning European markets, free of national barriers, we will create, at the same time, a field for normal dispute between political parties about how to manage them, the role of the state, the role of the market etc.

4. The second challenge: how to give legitimacy to integration. The debate now under way concerns far-reaching solutions. There is talk of a European federation, a government, a second chamber of Parliament, a president. There is talk, therefore, of an institutional and constitutional shape. Let us reiterate here: without substance (foreign policy, armed forces and a fully integrated economy), a constitutional design going that far will not serve its basic purpose: to strengthen the legitimacy of European integration. In other words, a Constitution alone may, if the present level of integration is maintained, turn out to be counterproductive. It may dispose the citizens unfavourably towards this concept, which has shown its unifying and integrating power e. g. in the case of the USA.

Formulation of objectives:

(a) Full participation by the states in the core of integration, called a European Federation. Full integration would involve the following:

i. A federal power structure,
ii. A fully integrated economy, enabling a competition game between the states and the regions, with due respect for competition rules, including different tax systems,
iii. A direct European tax on the populace,
iv. Foreign policy and defence policy in the hands of democratically elected and legitimised representatives, for which they are fully accountable at elections,
v. A uniform electoral law governing elections to the European Parliament, which elects the European Commission,
vi. Preservation of the two-track legitimisation of decision-making by maintaining the Community method (the Commission proposes, the intergovernmental Council and supranational Parliament jointly enact, the member states enforce through their governments and parliaments),
vii. Solidarity in jointly guarding the external border (border guards, customs services), in defence of the border and the territory: security guarantees.

(b) Membership in the European Federation is underpinned by enhanced financial solidarity to benefit disadvantaged regions and social groups. To this end, a direct European tax should be imposed, payable by all working citizens. The EF budget would be derived solely from customs receipts and the tax on the citizens.

(c) A Constitution would provide the basis for the operation of the European Federation.

(d) Flexibility of integration, i.e. optional participation in policies and areas of integration, would be allowed only outside the fully integrated European Federation. Membership of the Federation would be voluntary.

(e) European Federation authorities would reflect the ‘dictatorship’ of the citizens, to replace the ‘dictatorship’ of the member states, with the important role of the latter in the legislative process to be fully preserved,

however. The power structure provided for in the Constitution would be as follows:

i. President of the Federation elected in general elections, with foreign policy and defence resting in his hands,
ii. The European Parliament elected in general elections held on the same day throughout the Federation subject to the same electoral law,
iii. The European Commission elected by the European Parliament and responsible for the management of the economy and the Federation's budget,
iv. A Council of the Federation, consisting of government ministers of the member states voting according to the weighted votes assigned to them, without veto powers,
v. Legislative procedure: co-decision procedure linking the Parliament with the Council, mandatory counter-signature by the President.

Practice, or How to Achieve the Set Objectives?

1. The right approach would be to determine at the same time the scope of integration, on the one hand, and how to give legitimacy to the integration project as a whole on the other hand, and only then to draw up a Constitution *par excellence*. An approach to be avoided is merely to collect and simplify the founding Treaties and 'attach' the Charter of Fundamental Rights, without radically broadening the scope of integration. Such an approach might 'use up' the concept of Constitution.

2. The Constitution requires a new stage of integration to be defined, requires a proportionately large challenge. Without such a challenge to legitimise the fact of drawing up such a historic document, it may not find legitimacy in the eyes of the citizens and fall into oblivion. In this context, the Charter of Fundamental Rights serves as a useful experience. It is the innovative way of drafting the Charter: a Convention, rather than change in the area of fundamental rights in Europe, that determines the greatness of this project today. The Charter is, therefore, a list of rights that already apply. Thus, a legitimate question the citizen may ask is what its greatness consists in, if it changes nothing in his life.

3. In connection with the Intergovernmental Conference 2004, an attempt is likely to be made to apply the Convention method to work out any possible amendments to the Treaties, or a Constitution. It is not a working method, however, that will give us an answer to the question about the depth of the legitimacy of this integration project.

4. A properly drafted Constitution, based on a radical deepening of integration, would have to be ratified by all countries willing to participate in a project of this kind. Non-ratification by more than one fifth of the EU member states, for example, would amount to cancelling the European Federation project.

A Closing Remark

The high requirements that seem necessary in order to ensure a future Constitution a due, high, place in the awareness of European citizens put its future in a doubtful light. A genuine Constitution will probably not be created. 'A defective Constitution' is likely to be created, resulting from a division of the Treaties into a fundamental part (i.e. the 'Constitution') and a part formulating the specific objectives of the integration process, as has generally been the case in the course of integration.

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A CONSTITUTION FOR AN ENLARGED EUROPE

Stefan Hambura

The question: 'Does the European Union need a Constitution?' touches upon a very topical subject, now widely discussed. It is a question about the very future of Europe: a union of independent nation states, a federal superstate, or a *sui generis* state? This issue is seen differently by the states of the Fifteen.

An advisable thing to do is to use the Charter of Fundamental Rights, which gave momentum to the constitutional debate and may become part of a future European Constitution, as a reference point for presenting reflections on 'a Constitution for Europe'. The Charter of Fundamental Rights was proclaimed on 7 December 2000 in Nice; consequently, it does not have a binding character. It was proclaimed by three institutions: the European Parliament, the Council and the Commission.

The evolution of the protection of fundamental rights on the Community level illustrates the way towards a 'Constitution for Europe'. In the 1950s, at the time when the three Communities were founded[1], their founders did not see the need for the Treaties to provide for some aspects of the protection of fundamental rights. Theoretically, these rights had already been enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, to which the founding Member States of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community were parties. On the other hand, it was assumed that the constitutional courts of the individual Member States would also watch over the protection of those rights. This assumption was proved wrong, however, as the European Court of Justice[2] found in its

[1] Cf. M. Pechstein, C. König, Die Europäische Union, Tübingen 2000

[2] Cf. S. Hambura, M. Muszyński, Karta Praw Podstawowych z komentarzem, Bielsko-Biała 2001

decisions that Community law should be directly applicable in the Member States, and that it had precedence over the Member States' domestic law (the principle of precedence of Community law). This was how it came about that the fundamental rights enjoying protection under domestic legal acts in a given Member State were no longer effective in collision with legal acts and decisions resulting from Community law.

This deficit in the protection of fundamental rights prompted the constitutional courts of the Member States into action. In its ruling of 29 May 1974, known as 'Solange I' ('As long as I'), the Federal Constitutional Court of the Federal Republic of Germany adopted a solution, likewise adopted by the constitutional courts of the other Member States. In accordance with those rulings, the Member States' constitutional courts were to verify the compatibility of the actions (legal acts) of Community bodies with the catalogues of fundamental rights enshrined in their respective Constitutions as long as the Communities did not draw up their own binding catalogue (i.e. one adopted by the European Parliament) of fundamental rights, corresponding to the national catalogues.

In 1986, in the preamble to the Single European Act, the Member States emphasised the fact of democracy being based on fundamental rights. The Federal Constitutional Court of the Federal Republic of Germany responded, in its ruling of 22 October 1986 (known as 'Solange II', i.e. 'As long as II'), by stressing the change of its position on ruling on the constitutionality of Community legislation in respect of fundamental rights. Under this ruling, as long as the European Community, and in particular European Court of Justice decisions, guaranteed a generally effective protection of fundamental rights regarding the actions of the Community bodies, the Court suspended its right to control the application of the Community legislation in force in Germany, and its constitutionality in respect of fundamental rights. However, as soon as 1989, in the Philip Morris case, known as the 'Wenn nicht' (Unless) case, the Federal Constitutional Court deemed it appropriate to determine the limits of the suspension of its right. It emphasised, accordingly, that in the case of any Community act violating the fundamental rights following from Germany's Basic Law, the European Court of Justice should abrogate such an act. For, if the fundamental rights following from the German Basic Law were not thus pro-

tected, the Federal Constitutional Court would be forced to grant such protection.

In other states, too, similar cases could be found. In its ruling in the Frontini case of 23 December 1973, the Italian Constitutional Court, acknowledging the precedence of Community law, reserved for itself the right to act, should an interpretation applied to Community legislation be in violation of the fundamental rights enshrined in the Italian Constitution. It reaffirmed its position in its 1984 ruling in the case Spa Granital v. Amministrazione delle Finanze dello Stato. In 1989, too, in the case Fragad v. Amministrazione delle Finanze dello Stato, the Court stressed it could not be deprived of its right to verify the constitutionality of Community legislation or to ensure that Community legislation was not in violation of human rights.

Upon the entry into force of the Maastricht Treaty, the position of fundamental rights changed once again. Article F(2) (now Article 6(2))[3] emphasized respect for the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as those following from the constitutional traditions common to the Member States. At the same time, a political idea appeared that the European Community should simply accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Council even requested the European Court of Justice to examine the matter; however, in its Opinion 2/94 of 28 March 1996, the Court found that accession was not possible under Community law. In its opinion, the Court relied on the assumption that the Community enjoyed only the powers being a sum of powers conferred upon it by the Treaty establishing the European Community, implied powers and the powers under Article 308 (ex-Article 235)[4] of the Treaty establishing the European Community. From none of those provisions could the Community's right to act in the area of human rights be derived. However, respect for human rights is a general condition of the lawfulness of all Community acts. The Community's accession to the ECPHR would entail

[3] Cf. S. Hambura, M. Muszyński, Traktat o Unii Europejskiej z komentarzem, Bielsko-Biała 2001

[4] Cf. S. Hambura, M. Muszyński, Traktat ustanawiający Wspólnotę Europejską z komentarzem, Bielsko-Biała 2002

integration of the matter of the Convention as a whole into Community law, which would mean exceeding its substantive scope as defined in the Treaty establishing the EC.

Another amendment to the Treaty, made in Amsterdam, strengthened the protection of fundamental rights even further. Article 6(1) thereof reads as follows:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

The change of the positions of the constitutional courts notwithstanding, a political demand appeared for a catalogue of fundamental rights to be written down. As a natural consequence of the process, the idea of a Charter of Fundamental Rights accordingly appeared. It was intended to strengthen the protective component and complement the catalogue of rights, taking account of the passage of time, the evolution of law, and the emergence of new branches of science and technology, introducing e. g. standards for the protection of personal data, biotechnology, environmental protection etc. It was also intended to become a specific list of the fundamental rights of the Union's citizens. A mandate to draw it up was granted by the Cologne European Council of 3-4 June 1999, which voiced a belief that respect for fundamental rights was 'a founding principle of the Union and an indispensable prerequisite for her legitimacy'.

The Tampere European Council of 16 October 1999 in its turn advocated the convening of a special body that assumed the name 'Convention' at its constituting session on 17 December 1999. The Convention comprised the following:

– 15 delegates of the heads of state and government,
– 16 Members of the European Parliament,
– 30 Members of national Parliaments,
– 1 representative of the Commission.

Roman Herzog, former President of the Federal Republic of Germany, was elected Chair of the Convention.

The first draft of the Charter was presented and tentatively adopted at the Santa Maria da Feira European Council on 19-20 June 2000 (in connection with the completion of the Portuguese EU Presidency), and, following

consultations involving 62 experts, it was to be submitted to the EU adoption procedure. The draft was finally approved on 2 October 2000.

The Charter is an interesting instrument from the point of view of the protection of fundamental rights. Being a continuation of the solution adopted in Article 6 of the Treaty on European Union, it creates a plane of protection by formulating a direct EU catalogue of fundamental rights, which may find its place in a European Constitution.

The next important steps towards a 'Constitution for Europe' are indicated by *Declaration No. 23 on the Future of the Union*[5] adopted in Nice. The Declaration calls upon the European Council to address the problem of the EU's future during the Laeken European Council in December 2001. Issues to be addressed under this process included a simplification of the Treaties and the role of national parliaments in the European architecture. Thus, it was acknowledged that the democratic legitimacy and transparency of the EU and its institutions needed to be improved and permanently guaranteed in order to bring them closer to the citizens of its Member States.

To recapitulate, one must say that in the future, when a 'Constitution for Europe' has become an irreversible subject, advantage may and should be taken of the experience gained by the European Union in the process of drafting the Charter of Fundamental Rights. This experience of the Convention commissioned to draft the Charter of Fundamental Rights should bear fruit in the form of acceptance by the citizens of the EU Member States. It was for the first time ever that they personally participated, via the Internet, in the drafting of EU provisions: provisions which have, regrettably, been merely proclaimed thus far.

At the next European Council summit at Laeken in December 2001, a decision should be reached whether the time has come to begin work on a 'Constitution for Europe'.

Stefan Hambura is a lawyer and expert of European Union affairs.

[5] Cf. S. Hambura, M. Muszyński, Traktat z Nicei z komentarzem, Bielsko-Biała 2001

THE DIVISION OF COMPETENCES BETWEEN EU INSTITUTIONS*

Christophe Hillion

The division of competences between the European Union's institutions has little to do with the classical separation of powers that applies in liberal democratic states. In the EU, there is not one legislative power, one executive power and one judicial power; it is rather impossible to assign any of the Union's 'governmental' functions to any particularly Union/Community institution. This presentation will give a brief overview of the institutional interplay within the Union (1); it will then underline the recent strengthened role of the European Council (2).

1. The EU institutional framework

Despite the so-called 'single institutional framework' established by Article 3 TEU, the powers conferred upon each institution vary depending on the 'pillar' within which such powers are exercised, and the area in question. This variable distribution of competence finds its legal basis in Article 5 TEU and is echoed by Article 7 EC. In other words, it appears more appropriate to envisage the *divisions*, in plural, rather than a single, static, division of institutions' competences.

Moreover, in reality, one should not necessarily speak of divisions but rather of *interactions* or *interplays* of institutions' competences. The three classical governmental functions are shared between the institutions. Legis-

* This paper summarises the remarks made at the symposium on the Constitution for the European Union, organised by the Centre for International Relations in December 2001; it does not attempt to give an exhaustive presentation of the EU institutional framework. The author wishes to thank Dr Michael Dougan and Ms Anne Myrjord for their helpful suggestions.

lative power is distributed in various ways. It can sometimes be exercised by the Council and the European Parliament in the framework of the co-decision procedure (Article 251 EC). On other occasions, the Council can act after a mere consultation of the EP (Article 308 EC) or even without (Article 133 EC), following a Commission's proposal. In specific circumstances, the Commission can legislate by itself, without the EP or the Council being *directly* involved (particularly in the context of EC competition policy).

So far as the executive power is concerned, the Commission and the national authorities share, in principle, the task of implementing EC law. The Commission may act alone, as in the field of EC competition policy. The Commission *qua* executive is usually controlled or assisted by committees made of Member States' representatives, a phenomenon which is usually referred to as "Comitology". The Council can act by itself in the Union context when it comes, for instance, to implementing EU Common Strategies adopted by the European Council (Article 23 TEU).

Similarly, at the judicial level, several actors are involved. In principle, the European Court of Justice, which includes the Court of First Instance, exercises judicial control over Community (Article 220 EC) and certain Union activities (Article 46 TEU). However, in EC competition cases, the Commission acts as a judge of first instance. Furthermore, the Council, meeting in the composition of the Heads of State or Government, controls the observance of Article 6 (1) TEU by Member States (Article 7 TEU). In this context, the EP is involved insofar as it has to give its assent to the Council for determining the existence of a serious and persistent Member State's breach of the principles of Article 6(1) TEU.

The foregoing succinct description shows that the Community, and *a fortiori* the Union, works through a complex interaction of its institutions acting on the basis of varying procedures and mandates, within a plurality of institutional arrangements. Hence, despite the Treaty concept of 'single institutional framework' establishing a clear definition of competences of each institution seems rather illusionary. The latest Treaty changes have amplified the diversity of institutional combinations by involving an increasing number of institutional and para-institutional actors.

Indeed, one may understand the concept of EC or EU *institutions* in various ways:

1) institutions in the formal legal sense (i.e. as provided in Article 5 TEU; Article 7 EC)

2) the advisory bodies (e. g. Committee of the Regions, the Economic and Social Committee)

3) other actors which are involved in the policy-making of the EU (European Council, European Central Bank…)

Institutions of the third category are not included in the 'single institutional framework' as are the bodies belonging to the two previous categories. They have nonetheless become intrinsically part of the Community/Union functioning.

As concerns particularly the European Council, its functioning is not regulated by any defined rules of procedure, nor is it submitted to the Court of Justice's judicial scrutiny. This specificity is all the more remarkable that the European Council has been granted a full-fledged decision-making power under the Treaty of Amsterdam. As Alan Dashwood once wrote 'reserving a role for the political leaders of the Union in the adoption of particular decisions was an innovation of the TEU, more especially in the title of the EC Treaty on economic and monetary policy,[1] and further instances have been added by the Treaty of Amsterdam[2] and the Treaty of Nice'.[3] This underlines a tendency whereby the 'classical' inter-institutional balance described above has been revisited.

2. The increasing role of the European Council

The remaining part of the presentation will take the form of a case-study. External relations is chosen as a area which is particularly illustrative of the European Council's increasing involvement in the development of EU policy, thereby highlighting a shift in the EU institutional architecture.

Looking at the Union from the outside and more specifically at the way it attempts to project itself to the outside world is informative. The deve-

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[1] New title VII, Part Three of the EC Treaty.

[2] e. g. Article 7(1) TEU; Article 13(1) and (2) TEU; Article 128(1) EC.

[3] Dashwood, A. 'Decision-Making at the Summit' 3 (2000) *Cambridge Yearbook of European Legal Studies*, p. 79.

lopment of the EU external dimension, with the requirements that it implies in terms of efficiency (notably in the context of the World Trade Organisation) and in terms of identity have an influence on the internal functioning. In other words, the picture of the Union projected at the external level can illustrate, or can sometimes be the premise of what is happening at the internal level.

The particular case of relations with Russia and Ukraine respectively, on the basis of the so-called 'Partnership', embodies key institutional developments which reflects an internal tendency whereby the European Council is strengthened as a body vis-à-vis other Community/Union institutions.

The Partnerships with Russia and Ukraine are founded on two legal instruments:[4] a Partnership and Cooperation Agreement, based on the EC Treaty; and a Common Strategy, adopted by the European Council on the basis of Title V of the TEU (Common Foreign Security Policy). The Partnerships therefore have an *inter-pillar* or *cross-pillar* dimension.

In institutional terms, the PCAs were negotiated by the Commission on the basis of the mandate fixed by the Council, as provided by Article 300 EC. Each of the Agreements was concluded by the Council, after the European Parliament gave its assent; they were thereafter ratified by all the Member States, the Community and the respective partner states. By contrast, the two Common Strategies, which are unilateral instruments, were adopted by the European Council – i.e. the Heads of States and Government and the President of the Commission together. No particular procedural requirements are set out in the Treaty. Article 13 TEU simply provides that the Strategy is decided on by the European Council, on the recommendation of the Council of the EU. On may assume that it was done by consensus. The European Parliament was not consulted.

One of the intriguing features of the Common Strategy is its precedence over the other existing instruments, be they CFSP instruments, Community instruments or Member States instruments. Point 41 of the Common Strategy with Ukraine provides that the Council, the Commission and the Member States shall:

[4] Both instruments are published in the Official Journal of the European Union, series 'Legislation'.

' – review, according to their powers and capacities, existing actions, programmes, instruments, and policies to ensure their consistency with this Common Strategy.

– make full and appropriate use of existing instruments and means, in particular the PCA as well as all relevant EU and Member States programmes, and to develop and maintain to this end an indicative inventory of the resources of the Union, the Community and the Member States through which the Common Strategy will be implemented.'

In other words, the PCAs, which were negotiated according to a Treaty-based procedure and ratified by the Member States and the partner states according to their constitutional requirements, have become instruments to implement the respective Common Strategies adopted by the European Council, outside the so-called 'single institutional framework'.

Indeed, by requiring that the Council and particularly the Commission make full use of existing instruments and means, the European Council actually determines the work of the Commission although the latter is in principle alone in initiating measures in the framework of the EC Treaty. This illustrates a more general tendency whereby the European Council is not only increasingly involved in setting the agenda (which is conform to the Treaty – Article 4 TEU – and compatible with the current institutional framework), but also ever more present as a decision-making entity,[5] which could put into question a number of existing institutional arrangements. The measures adopted on the basis of the Common strategy with Russia are particularly illustrative of the consequences of this institutional development.[6]

3. Concluding remarks

It has been recalled that the institutional organisation of the EC/EU does not correspond to the classical liberal constitutional arrangements found at the level of nation-states. Rather, the EU as a law-making entity implies a

[5] That is the case in relation to the Economic and Monetary Union, the European Defence and Security policy and indeed, the enlargement process.

[6] See from the same author, 'Institutional aspects of the partnership between the EU and the newly independent states of the former Soviet Union – case studies of Russia and Ukraine', 37 *Common Market Law Review* (2000), 1211, at 1228 ff.

peculiar interplay between a number of bodies. The making of a constitution, which is the subject of this symposium, will have to deconstruct these subtle institutional arrangements, if the ambition is to set out a clear text, readable for the citizens.

In addition, the growing importance and *de facto* institutionalisation of the European Council will have to be seriously considered in this constitutional exercise. The European Council needs to be more properly established in the EU institutional framework, and its activities more clearly defined. In doing so, one will have to provide answers to the question of what body will be its most appropriate and legitimate *contre-pouvoir*. The judicial control over the European Council's activities will also have to be tackled. If the European Council is confirmed as a law-making entity, a key question will be whether the Court of Justice should be granted the authority to control the legality of the European Council's acts.

Christophe Hillion – Centre for European Legal Studies, University of Cambridge

THE HORIZONTAL DIVISION OF POWERS – THE INSTITUTIONAL BALANCE WITHIN THE EU

Rafał Trzaskowski

I was asked by the organisers to share a few comments on the question of the institutional balance within the EU. No doubt this question, even though not formally on the Agenda of the future IGC (only certain aspects of it – i.e. bringing the national parliaments closer to the integration process, were explicitly mentioned in the Protocol to the Nice Treaty) is going to dominate the works of the Convention and of the future IGC.

Because of the time contraint, I decided to forgo a coherent and structured presentation of the issue. Instead, I will present a few thoughts and observations concerning the so-called horizontal division of powers within the EU. Some of those thoughts are inevitably formulated as questions. However, I am convinced, that in certain circumstances, asking good questions may be as difficult as presenting answers to them.

1. The recent and not so-recent developments within the EU institutional triangle. Has the balance been tipped?

   a. What are the implications of the altered co-decision procedure for the intra-EU institutional balance? Sidelining the Commission? Is the EP progressively closer to the Council?

The inter-institutional balance within the three institutions has been significantly influenced by the recent Treaties. The introduction of the co-decision procedure in the Maastricht Treaty was the most important of the changes, as it strengthened the position of the European Parliament – transforming it slowly into a co-legislator. The alteration of that procedure by the subsequent Amsterdam Treaty put the European Parliament on an equal footing with the Council.

Such developments in turn, progressively weakened the position of the Commission in the EU decision-making process. The Commission retained its right of initiative – however, its proposals, after they have been agreed by the Council and the European Parliament, rarely resemble its original initiatives. Quite obviously it is a development of political nature. The Member States were unwilling to endow the supranational institutions with more relative power so they decided to strengthen the Parliament at the expense of the Commission. Such trend was continued in Amsterdam.

b. Did Nice strengthen the Commission?

1. The Commission's White Paper on Governance – Good intentions went berserk! (Regaining lost ground or 'benevolent dictatorship'[1])

The Commission has been progressively weakened. Quite obviously with the publication of its White Paper on Governance the Commission strives at regaining the lost ground. The question is whether the Commission is wishing to do just that, or whether is thinking to introduce a form of 'benevolent dictatorship'. The balance has been tipped and the Commission lost its power which has a negative influence the integration process as such. It should by all means regain some ground. However, my thesis is that if the Commission goes too far, its efforts can become counterproductive.

a. Framework legislation – the Commission responsible for the whole implementation – do these changes go in the direction of French-style centralisation?

b. The implications of suppressed comitology (abolishing management and regulatory committees)

The Commission put forward an idea to surpass comitology – abolishing management and regulatory committees (basically the ones in which the Council has something to say). Such move would further enrage the Member States.

c. Using the right to withdraw legislation in a strategic manner

Another idea which runs in the same direction is the Commission's proposal to use the right to withdraw legislation in a strategic manner. The Commission can, in principle, withdraw the legislation but it does not do so in practice. In the White Paper it 'threatens' the Member States to use that prerogative.

d. Does the Commission have enough legitimacy and capability to strengthen its position to such a degree?

e. Can the White Paper really turn out to be counterproductive? (The negative reactions from the Council and from the European Parliament – the Kaufmann Report)[2]

3. Dealing with 'the deficit of democracy' vs. 'dealing with democratic deficit' – effectiveness vs. marketing

I sometimes have an impression that the EU is unfortunately more concerned with wrapping things up and selling them to the public than with the effectiveness of its decision-making process. 'Marketing' – bringing the EU closer to the people – is in itself very important, however the smooth running of the institutional machinery is even more crucial. The issue of bringing the national parliaments closer to the people is a good case in point – here, I have an impression, that the EU is more concerned with imagery than with effectiveness.

(I asked Mr. Oleksy, who is the Chairman of the European Committee in the Polish Sejm, about his view on the issue. I asked him whether the idea of Tony Blair was close to his heart? He didn't answer the question directly but he said that Prime-minister Miller published a declaration with Tony Blair on the issue, in which they are saying that the third institutional chamber would be a good idea). I don't agree with that.

a. I strongly believe that the EU does not need yet another institutional chamber?

- First of all, it would actually decrease the transparency of the whole system.
- Second of all, it would duplicate the existing structures.
- Thirdly, it would have to rely on haphazard majorities (if there is an important vote in X Member State its parliamentarians would not be present in Brussels)

[1] Term used by Fritz. W. Scharpf (2001) European Governance: Common Concerns vs. the Challenge of Diversity. Jean Monnet Working Paper, 07/01.

[2] Kaufmann Report – European Parliament – 28.11.2001.

– Fourthly, its role in the decision-making process would be unclear – when should the chamber intervene?

b. How to bring the national parliaments closer to the EU in a different manner? There are quite a few options floating around:

– Barnier's ideas – participation in the governmental delegations to the Council. Is it feasible?
– The Danish system? (Every minister who goes to the Council meeting is given beforehand a mandate by the parliamentary committee, that mandate cannot be encroached upon. The minister has to call the parliamentary committee whenever he wants to go beyond it). It would be quite interesting to discuss it whether there is a possibility to introduce such a solution in the Polish reality? I personally doubt it but the discussion may prove to be quite interesting.
– The Competence Committee – composed of MEPs and national MPs that would review EU legislation in light of autonomy preservation and subsidiarity procedure (proposed by Florence EUI – Boerzel/Risse).[3]

4. The non-Treaty reforms within the Council – along the lines of the Trumpf-Piris Report.[4]

a. the rotating Presidency (Laeken?)

– Political efficiency vs. legitimating imagery

For all the member states it is very important to exercise the EU Presidency once in a while – least to further legitimise the EU at home. The real question which arises in the context of enlargement is whether the EU can really afford the current system? Should it be changed? How should it be changed?

– Are team Presidencies feasible? Do they constitute a danger to the weaker member states (does it create a leeway for "directoire"?) Who is going to be in the limelight?

[3] Tanja. A. Boerzel. Thomas Risse. (2001) The Post-Nice Agenda of the European Union: What's the Problem, How to Deal With It, and What to Avoid. EUI Robert Schuman Centre of Advanced Studies Working Paper. 03.05.01.

[4] Trumpf/Piris Report. Operation of the Council with an Enlarged Union in Prospect. Brussels (10.03.1999) Nr: 2139/99.

b. The idea to establish a new Council for European Ministers

– Has the general Affairs Council become obsolete?

It would be quite interesting to discuss that issue with the representatives of the Ministry of Foreign Affairs. Some academics are saying that foreign ministries in the present state of affairs are not well equipped to run the whole EU process, as much of it does not concern the domain of foreign relations. This is a very controversial issue.

– Is creating a new European ministers Council feasible in the light of diverging organisational structures in different Member States?
– How should this question be seen from the Polish perspective? (in the context of the current, internal reform of the relations between UKIE and MFA in Poland) Do our reforms run against the European trend?

Conclusion

The post-Laeken debate will yet again touch upon the question of the balance within the EU institutions. Is it possible to tackle the issue of such dimension without actually treating the question of EU Constitution, without going into the federal direction?

Some of the presenters (Ulrike Guérot) here claimed that only when the EU were to go in the federal direction it would become possible to resolve all these difficult questions. Is it true? Is it possible to tackle all of these seemingly technical questions without having a grand project somewhere at the back of our mind?

Rafał Trzaskowski – College of Europe at Natolin

CLARIFYING THE DELIMITATION OF COMPETENCIES WITHIN THE EU MULTI LEVEL SYSTEM

Thomas Fischer

1. I will confine myself to a few basic remarks concerning the reform of the delimitation of competencies between the European Union and its member states. There are mainly three reasons for the need to re-organise the vertical distribution of powers as provided for in the EU Treaty at present. The first one is rather simplistic and of a purely formal nature: in the declaration on the future of the Union attached to the Nice Treaty the member states agreed to clarify the delimitation of tasks until 2004. Basically, they took this decision for two material reasons. In order to maintain public support the European Union has to strive for increased transparency with regard to the scope and intensity of responsibilities assigned to the EU level. Apparently, this aim of increased transparency is closely interwoven with the objective of simplifying the Treaties and elaborating a European constitutional document. At once, however, political accountability and effective political action ought to be strengthened by clearly denominating what should be done by the Union on the one hand and the member states, respectively – this is particularly important from the point of view of the German Länder – their regions, on the other hand.

2. Any effort to reform the system of competency assignment has to cope with the problem that the current treaty framework is characterised by kind of a paradox. There is no doubt that the combination of generally defined tasks and goals in Article 3 TEC and the restricted specific empowerments in the third part of the TEC dealing with the different Community Policies have considerably contributed to the high dynamism of European integration. Several treaty provisions like Articel 95 on the completion of the internal market are based on a merely functional definition of tasks and lack any material delimitation of policy fields. Due to this fact there is considerable leeway for the EU institutions, especially the European Commission, to apply European competencies in a quite extensive manner and to foster a strong tendency towards centralisation within the multilevel system of the European Union in this way. At once, however, the Treaty provisions on the distribution of tasks already constitute kind of a catalogue of competencies which is not only quite similar to those in federal states but even more precise in some respect. In contrast to national constitutions there is not only one catalogue of competencies but a two level delimitation which includes both the list of tasks in Article 3 and the special provisions for each Community Policy in Article 23 to 188 TEC.

3. In my eyes, one of the main tasks of the next Intergovernmental Conference in 2004 is to reduce this gap between functional provisions guaranteeing the dynamism of European integration on the one hand and an extremely detailed delimitation of competencies in the Treaty framework on the other hand. In this short-term perspective absolute priority should be given to a better readability of the Treaty text. Only in the long run it might be possible to realise a far-reaching re-distribution of competencies between the European and its Member States in accordance with criteria like efficient governance or public acceptance. This is my third point. According to the wording of the Nice Declaration on the Future of the European Union, what we are talking about at the moment is just a more precise delimitation of competencies. We should keep in mind that this project is much less ambitious than a fundamental re-distribution of competencies. One of the lessons we can learn from the extremely ambitious institutional reform agenda of the Intergovernmental Conference 2000 is that a more pragmatic step-by-step approach which pays due attention to the question of political feasibility tends to facilitate treaty negotiations and improves the prospect of their successful conclusion. From my point of view it is particularly striking that this central aspect is largely ignored in the German debate on the future shape of Europe. Especially the richer Länder still insist that there should be a basic re-distribution, i.e. re-nationalisation, of competenices in fields like agriculture, structural policy or competition policy. Indeed some of these claims seem to question the very foundations of European integration. For sure, these far-reaching demands will not facilitate consensus-building among the member states in 2004.

4. If we want to avoid another gridlock in treaty reforms after the disappointing results of Nice it appears much more promising to restrict the political mandate of the IGC 2004 to a more transparent delimitation of competencies, thereby putting the emphasis on a simplification of the Treaties. First of all, we need a clear categorisation of the competencies we currently find there. Referring to our work in the Bertelsmann Foundation, I suggest a distinction between five categories to systematise the case-by-case empowerments in the Treaty text:

– The first category comprises constitutional affairs like the accession of new member states and revisions of the Treaties.
– Exclusive competencies of the European Union like the Customs Union or Monetary Policy in the "Euro zone" form the second category.
– As a third category we suggest "Common Policies", i.e. concurrent competencies. Obviously, this category applies to most policy fields regulated by the Treaties. Generally, it is extremely difficult to draw a clear line between European and member state competencies. For most fields there is a system of mixed or shared responsibilities which we should come to terms with in political reality. Later I will come back to this point which clearly illustrates that it is at least as important to talk about the execution of powers as of the distribution of tasks. And by the way, this is just the reason why I think that the Commission´s White Paper on European Governance is an extremely valuable contribution to the current debate.
– The fourth category that we suggest is the category of complementary powers including, for instance, education and culture or other policy fields where the influence of the European level is restricted to granting financial support.
– And finally, there are the fields of mere co-ordination as fourth category where the role of European institutions remains extremely limited. This last category covers, for example, all areas the new Lisbon method of open co-ordination is applied to and where the Commission fulfils no regulatory function but only defines indicators to control whether specific targets have been reached or not.

5. Coming back to the third category of "Common Policies", i.e. concurrent competencies, I would like to draw your attention to the question of decision making procedures. We should be aware that the voting rule of unanimity has been maintained in many policy fields since member states try to compensate for a lack of clarity with regard to the distribution of tasks by insisting on their veto power in decision making. By the rule of unanimity member states are able to prevent an extensive or even excessive application of the European competencies the Treaties provide for. Against this background a more precise delimitation of competencies in the Treaties will probably increase the readiness of member states to accept qualified majority voting as general decision making rule in the Council and not to cling any longer to the principle of unanimity. Apparently, this point is particularly relevant for the large array of concurrent competencies.

6. In the longer run, one should generally try to re-order decision making procedures along the lines of the different categories of competencies outlined above. This would mean, for example, that decisions in the field of constitutional affairs will continue to be taken unanimously and only enter into force after their ratification by national parliaments. As concerns the categories of exclusive, concurrent, and complementary EU competencies, co-decision making combined with qualified majority voting in the Council should be introduced as general rule. In the fields of mere co-ordination, however, consultation of the European Parliament would be sufficient while unanimity should remain the voting rule in the Council.

7. In a third and final step one should try to categorise the different regulatory instruments which are at the disposal of the European level and to establish a clear hierarchy of norms. At the moment there is a large array of different instruments like directives, regulations, recommendation which are applied quite arbitrarily. They could also be systematised according to different categories of competencies. In the field of exclusive competencies, for instance, regulations would be the main instrument. In a hierarchy of norms they would be substituted by the new instrument of European laws. As far as concurrent and complementary competencies are concerned one should generally apply the instrument of directives or framework laws. And finally, with regard to fields of co-ordination, only legally non-binding recommendations should be permitted.

8. In conclusion I would like to add a few final remarks concerning the White Paper on European Governance which was published by the Commission in July 2000. In contrast to the widespread criticism I think the Com-

mission´s approach is rather interesting and must be read in the broader context of the current debate about the future delimitation of competencies in the European multilevel system. The authors of the White paper explicitly declare that they deal with the question how to exert competencies in a way which is in compliance with the principle of "good governance". Their special emphasis is on exploring new mechanism of consultation to improve the participation of the citizens and civil society in European decision making. The basic assumption of the White Paper is that modern governance is characterised by complex patterns of networking which are indispensable to create legitimacy and to increase public support for European integration. I agree with this approach in so far as I do not believe that it will be possible to overcome the democratic deficit of EU decision making simply by strengthening the role of the European Parliament. On the other hand, I perfectly agree with critics of the Commission´s approach who stress that a stronger involvement of civil society cannot serve as a substitute for an increased influence of democratically elected parliamentarians and members of government from the European, national and regional level. I think both dimensions complement one another and the Commission is simply stressing the first aspect. For that reason I regret that the White Paper on Government has received such little public attention up to now. I think we should pay much more attention to its proposals in the preliminary stages of the next Treaty revision in 2004.

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THE FUTURE OF EUROPE IN THE OPINION OF POLISH POLITICIANS

A Discussion organised by the Centre for International Relations (Warsaw, 6 December 2001)

prepared by Jörg Forbrig

The European Union finds herself at a turning point. From within, important questions arise around deepening the process of European integration and the possible inclusion of further political, economic and social dimensions. From without, the process of Eastward enlargement is gaining in momentum, and as of 2004, the European Union may boast as many as 25 member states, most of them from Eastern Europe. Owing to this double impetus, a lively debate on the future of the European Union has been sparked, it is reflected in the proceedings of the Nice as well as the more recent Laeken summits, it has been fuelled by numerous initiatives of various member states, and it will be continued through the work of the upcoming European convent.

What has thus become the dominant theme of political and public discussion touches upon questions fundamental to the European Union and its member states alike. On the level of individual countries, this debate necessitates a clarification of traditions and interests deemed vital for a given country. More specifically with regard to the European Union, it is inevitable that member states clarify their expectations towards, their commitment to and their responsibility for the process of European integration. Only once positions are thus clarified, it will be possible to design in more detail the institutional implications that derive from them and, that is, to shape the future of the European Union more practically.

The current debate and its concrete results also have a bearing on future members of the European Union. Given the recent acceleration of the enlargement process, the accession of Poland to the European Union is taking

shape. For as long as enlargement was a rather distant prospect, a discussion of Polish interests in and expectations towards the European Union may have been of lesser urgency. With membership near at hand, however, such issues assume an utmost relevance, since it is only by clarifying her positions internally and articulating them on the European scene that Poland can hope to influence the current discussion within the European Union prior to becoming a member herself. Moreover, an informed and constructive debate on these fundamental questions is likely to have important repercussions with the broader Polish public, whose vote in the 2003 referendum will finally decide about the accession of Poland to the European Union.

Against this background, the Centre for International Relations, Warsaw decided to initiate a public debate in order to discuss Polish positions on the future of the European Union. A first panel discussion took place on 6 December 2001 at the Press Centre of the Polish Information Agency in Warsaw. The following member of the Sejm participated in this discussion:

- Józef Oleksy, Sojusz Lewicy Demokratycznej (Democratic Left Alliance)
- Kazimierz Marcinkiewicz, Prawo i Sprawiedliwość (Law and Justice)
- Jan Łopuszański, Liga Polskich Rodzin (League of Polish Families)
- Jan Maria Rokita, Platforma Obywatelska (Civic Platform)

The discussion was chaired by Ambassador Janusz Reiter, Director of the Center of International Relations. After brief introductory remarks by the chair addressing the need for a debate on Polish visions for the future of the European Union, the individual speakers outlined their perspectives. Their contributions were largely guided by the following questions:

- Is the accession of Poland to the European Union desirable or not?
- Which crucial interests of Poland are to respected by Polish membership?
- Which model of the European Union is most commensurate with Polish interests?

The following provides a summary of the individual contributions during the debate. In addition, the main positions and answers outlined by participants are provided in abbreviated form.

JÓZEF OLEKSY

Poland's accession to the European Union, about whose desirability Oleksy is explicit, requires a discussion and determination of those interests that, in hierarchical order, are considered most important for the country. Only against clearly defined interests will it be possible to assess, how membership in the European Union can contribute to realising those interests.

In Oleksy's view, three interests are of utmost importance for the Polish people. Firstly, security and sovereignty must be guaranteed. Secondly, the prosperity of the country and its citizens are a crucial objective. Finally, the conditions have to be created that allow Polish people to conduct a humane and spiritual existence.

These three interests are best served by Poland's membership in the European Union. Oleksy draws attention to the fact that, as any other scheme of regional co-operation, so too does the European Union enlarge the possibilities for guaranteeing the security of individual member states. Moreover, by combining with the more developed countries of the European Union, Poland will improve the prospects for a life in prosperity and spiritual fulfilment on part of its citizens. On all three accounts, then, an accession of Poland to the European Union is crucial.

None of these interests, Oleksy continues, is opposed to the idea of the state, its identity and interests. What is frequently brought forward against Polish membership in the European is the fact that it presumably infringes upon the sovereignty and interests of the Polish state. According to Aristotle, he maintains, the good state is the one that provides its citizens precisely with security and the conditions for a prosperous and spiritual life. If thus the interests of Polish people are essentially congruous with those of the good state, and if those interests are furthered by membership in the European Union, one cannot reject Poland's membership on the grounds of autonomous state interests, since these would contradict the interests of the majority of Polish people.

A last aspect Oleksy takes issue with is the nature of Polish patriotism. According to him, one finds the paradox that those values central to Polish patriotism have long been acknowledged by other countries, among them those forming the European Union. Yet simultaneously it is frequently

postulated in Poland that membership in the European Union threatens precisely those values. What Oleksy advocates, therefore, is a re-definition of patriotism in Poland. Necessary is a shift from the current model of xenophobic, fear-based patriotism towards a more open form that emphasises the possibilities for achieving the values so central to Poland.

Summary of Positions

- Membership in the European Union: desirable
- Crucial Interests of Poland: security conditions for prosperity, conditions for a humane and spiritual existence
- Future Shape of the European Union: federalisation as an option worth considering federalisation only of the entire European Union future shape to be determined after enlargement

KAZIMIERZ MARCINKIEWICZ

Marcinkiewicz takes his point of departure with the distinct perspectives of the European Union that one finds on the two sides of the Left-Right divide. Apart from the difficulty of applying the Left-Right scheme to Poland, one can nevertheless identify a number of differences relating to the process of European integration and the future shape of the European Union.

The first crucial issue distinguishing the positions of the Left and the Right with regard to the European Union is the question of sovereignty. For Marcinkiewicz, it is necessary today to determine sovereignty as the area of decision-making affecting all citizens who, in turn, influence the process of arriving at those decisions. The European Union, by contrast, makes manifold decisions, on which states and their citizens have very little, if any, influence. Nonetheless, the process of European integration is commonly portrayed as an enlargement, not as a diminution of sovereignty, a distortion the speaker greatly disagrees with.

A case in point here is the question of securing its external borders, an important question for Poland once it joins the European Union. Marcinkiewicz strongly opposes a transfer of sovereignty in this question to the European Union by creating a common border guard in charge of external frontiers.

A second question relates to the question of Poland's accession to the European Union. In Marcinkiewicz's view, the Polish Left largely emphasises the pace of the enlargement process, while the Polish Right stresses the conditions, under which Poland should become a member of the European Union. At this point, Marcinkiewicz explicitly advocates Polish membership, since he considers the European Union "the future of Europe". He maintains, however, that Poland strongly needs to negotiate the conditions, which make membership beneficial for the country.

Finally, the differential perspectives of Left and Right can also be illustrated with regard to the future shape of the European Union. For the European Left, with the Polish Left essentially copying this view, the future lies with a European state or some federal construct unifying the states of Europe. The institutions of this European state or federation will of necessity be superior to those of the member states, a prospect the Polish Right clearly rejects. A federalisation of the European Union is consequently not conducive to any improvement. Instead, and here Marcinkiewicz explicitly expresses his anxiety, a federation as foreseen by European social democracy is likely to be as bureaucratic as is the present Brussels administration.

Summary of Positions

- Membership in the European Union: desirable under agreeable conditions
- Crucial Interests of Poland: state sovereignty
- Future Shape of the European Union: federalisation as a threat to Polish sovereignty and as a fearsome scenario of further bureaucratisation

JAN ŁOPUSZAŃSKI

Significant parts of the Polish public reject an accession of their country to the European Union, and it is this constituency that Łopuszański claims to represent. In his view, this rejection is justified on a number of grounds.

Firstly, Łopuszański argues that the current state of the European Union exhibits a number of flaws that result from the fact that the present and any further degree of integration had never been foreseen by the founding fathers of the European Union. Their vision had, according to Łopuszański, not entailed any curtailing of member states' sovereignty, neither by way of a European state nor in form of European Union law that is superior to the law of member states.

A second reason is for Łopuszański the inevitable tendency of any federal setting towards unitarianism. In his view, historical experience in Poland has shown that, of necessity, the centre assumes prerogatives over its federal parts. In the European Union, this tendency can be clearly illustrated through the European Monetary Union that, in order to be sustainable, requires the establishment of a central power whose competencies are superior to those of the member states.

It is also against historical experience that a third objection, that of practical impossibility, is raised by Łopuszański. For him, the establishment of a shared value basis among fifteen, soon even up to twenty-five member countries is not feasible. Instead, the European Union finds its foundation in the mammon on the one hand, and in the bureaucracy of Brussels, on the other.

On these grounds, Łopuszański argues fourthly, the European Union is not a setting serving all its citizens. In alluding to the Aristotelian idea of the good state invoked by Oleksy, Łopuszański points out that the good state was to serve all citizens, while a bad one benefits only part of the populace. From this angle, the European Union cannot but represent a fraction of the people, and it is consequently in the interest of the Polish people not to join as a member.

Lastly, in Łopuszański's view, Poland is under threat today to be "thrown" into the European Union, as the dominant position of Brussels as well as the cowardice of the Polish negotiating elite largely disregard the will of the Polish people. This, however, dooms Poland to the same fate as the entire European Union, namely oblivion.

For these reasons, Łopuszański advocates that Poland retains a position outside the European Union. In this sovereign position, Poland is to co-operate with the European Union as well as with other countries, notably with Russia.

Summary of Positions

- Membership in the European Union: undesirable
- Crucial Interests of Poland: state sovereignty good of all citizens
- Future Shape of the European Union: unitarian tendencies aggravating crisis

JAN MARIA ROKITA

In the opening of his presentation, Rokita explicitly acknowledges the necessity for and the potential of a federalisation of the European Union. In his perspective, it is only through a federal setting involving all members that the European Union can find a way out of its current impasse.

In its current form, according to Rokita, the European Union represents a hybrid structure that is neither functional nor sustainable. While it functioned for as long as at the basis of the European Union lay primarily economic mechanisms, the introduction of political elements of integration has changed the nature of the European project but has not sufficiently restructured it institutionally. Competencies are not clearly separated between the European Union and the member states. Brussels assumes ever greater influence but is under ever less control.

Rokita foresees three possible scenarios for this hybrid European Union. Firstly, crisis deepens and renders the European Union increasingly inoperable, with all the negative effects resulting from an unreformed and dysfunctional institutional setting.

Secondly, within the European Union emerges a real, federal union that involves a smaller number of countries and that is based on institutions of so-called closer co-operation, such as a common government, parliament and

presidency. This scenario would narrow the process of European integration to select member states, among whom Poland would not find herself.

Thirdly, the European Union develops towards a constitution and a treaty on competencies. This scenario would clarify the constellation of powers and competencies, facilitate the development of a primary union law, and decentralise competencies in contrast to the current over-regulation by the European Commission. This case would include all, current and future, member states.

Rokita clearly advocates the third option, which he considers superior to either aggravated crisis or a solution that excludes Poland. Strong support is thus lent not only to Polish membership but also to an explicitly federal vision for the European Union.

This perspective is further elaborated with regard to the interests that should guide Poland's integration with the European Union. Here, Rokita suggests four main areas. Poland must participate in the European Union with the full rights granted to current member states. As many instruments for the further development of Poland must be secured upon accession to the European Union. Membership has to be achieved before Russia rebuilds its influence in Europe. Lastly, Poland should strongly support the federalisation of the European Union.

Summary of Positions

- Membership in the European Union: desirable
- Crucial Interests of Poland: full and equal membership rights instruments for further development security against Russian influence in Europe
- Future Shape of the European Union: consequent federalisation of the entire Union

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